Office-Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-45

In the Supreme Court of the United States

OCTOBER TERM, 1980

In re GERALDINE G. CANNON,

Petitioner.

JOINT RESPONSE OF RESPONDENTS THE UNIVERSITY OF CHICAGO, ET AL. AND NORTHWESTERN UNIVERSITY ET AL. IN OPPOSITION TO PETITIONER'S MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR WRIT OF MANDAMUS.

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Respondents The University of Chicago, *et al.* and Northwestern University, *et al.*, Defendants-Appellees in the underlying action before the United States Court of Appeals for the Seventh Circuit,* jointly oppose the Motion to Expedite Consideration filed by Petitioner Geraldine G. Cannon.

*In its opinion issued May 6, 1981, the Court of Appeals affirmed the dismissal by the District Court of Petitioner's complaints against the universities' medical schools for failure to state a claim. *Cannon v. University of Chicago,* ..... F.2d ....., No. 80-1763 (7th Cir. 1981). A copy of the Seventh Circuit's opinion is attached as an appendix to the petition filed with the Motion to Expedite Consideration.

Petitioner requests the Court to expedite its consideration of her Petition for Writ of Mandamus

> "so that, if the petition is granted, a hearing on the merits of her related civil rights claim may be held in the district court prior to the commencement of the next entering medical school class at Northwestern University on September 21, 1981, and at The University of Chicago on October 23, 1981." (Motion to Expedite Consideration, at 2).

Thus, Petitioner requests this Court to take the extraordinary step of deciding the merits of her petition during recess, prior to the commencement of the October, 1981 term, only as a predicate to a further hearing before the District Court on the merits of her claim that she was the victim of sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1861 *et seq.* The motion should be denied for several reasons.

First, there is no basis for believing that, even with expedited consideration of her petition by this Court, Petitioner would have any likelihood of prevailing before this Court, obtaining an emergency hearing on her claims before the District Court, and prevailing on those claims prior to the commencement of the fall 1981 terms. The Court of Appeals carefully considered and rejected the very contention that Petitioner raises as the question in her petition here. Her Petition for Rehearing and Suggestion for Rehearing in Banc, which presented the same argument, was denied with no judge in active service even requesting a response. As Respondents will demonstrate when they file their joint response to the petition, Petitioner's effort to find error in the Court of Appeals' decision is without merit.

Moreover, if these cases were to be remanded to the District Court, Petitioner would still have to prevail on the long-pending motions for summary judgment that Respondents filed with their motions to dismiss. The District Court did not reach these motions, dismissing the complaints instead for failure to state a claim. Respondents subsequently requested the Court of Appeals to grant them summary judgment in the event it found Petitioner's complaints to be legally sufficient. The Court of Appeals, in affirming, had no need to pass on the motions for summary judgment. However, the Court did note that "the defendants' argument is persuasive on this issue." (Petitioner's App., at 13a). Thus, there is virtually no likelihood that expedited consideration by this Court would result in the ultimate relief Petitioner seeks.

Further, expedited consideration by this Court should be denied because Petitioner has already had a hearing on the merits of her underlying claims and has not prevailed. The District Court heard evidence on Petitioner's motion for a preliminary injunction on September 21, 24, 26, 27, and 28, and October 2, 1979. At the close of Petitioner's presentation, the District Court denied her motion. (A copy of the District Court's October 22, 1979 Findings of Fact, Conclusions of Law, and Order are attached hereto as Exhibit A.) The Court of Appeals affirmed this denial. (A copy of the Court of Appeals' April 25, 1980 Order in *Cannon* v. *University of Chicago*, No. 79-2207, is attached hereto as Exhibit B.) Thus, she has already had one opportunity to present her evidence in support of an emergency, interlocutory injunction and did not prevail.

Finally, expedited consideration and disposition during this Court's recess ought to be reserved for truly extra-

ordinary cases. Petitioner will suffer at most only a single year's delay in admission to medical school. Expedited consideration is simply inappropriate here.

Respectfully submitted,

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EXHIBIT A

In the

United States District Court

For the Northern District of Illinois

EASTERN DIVISION

GERALDINE G. CANNON,

Plaintiff,

v.

THE UNIVERSITY OF CHICAGO, et. al.

Defendants.

No. 75 C 2402

GERALDINE G. CANNON,

Plaintiff,

v.

NORTHWESTERN UNIVERSITY, et. al.

Defendants.

No. 75 C 2724

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

These matters having been consolidated solely for the purpose of hearing plaintiff's motion for preliminary injunction; and plaintiff having presented evidence in support of said motion in open court on September 21, 24, 26, 27 and 28, and October 2, 1979, and defendants having moved at the close of plaintiff's proof for the entry of an order denying

her motion for a preliminary injunction; the Court, pursuant to *Rule 52* of the *Federal Rules of Civil Procedure*, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is a 44 year old woman, married and the mother of five children.

2. Plaintiff took some undergraduate college courses in connection with her nursing education at St. Francis School of Nursing and licensing as a Registered Professional Nurse in Illinois in the 1950's. In 1972 she resumed her undergraduate studies at Trinity College in Deerfield, Illinois.

3. In May, 1975 Plaintiff obtained an A.B. degree *cum laude* from Trinity College, with a major in biology.

4. In October, 1974, prior to obtaining her undergraduate degree, plaintiff took the Medical College Admission Test (MCAT) and achieved the following test scores: science-585, quantitative ability-525, verbal ability-605, general information-625; for an average total MCAT score of 585.

5. In October, 1974 plaintiff applied for admission to the 1975-1976 entering class at ten medical schools including the Pritzker School of Medicine at the University of Chicago and the Northwestern University Medical School, both of which were receiving federal financial assistance at all times pertinent hereto.

6. In connection with her applications, plaintiff consulted certain booklets published by the Association of American Medical Colleges which contained information with respect to the defendant medical schools. As to the University of Chicago, one booklet stated:

"Applicants over 30 without advanced degrees and foreign citizens without at least one year of completed studies in an American school are not encouraged to apply.

With respect to Northwestern University, the foregoing booklets stated:

"Applicants over 30 years of age are at a disadvantage."

"Few applicants above the age of 30 are considered; the absolute age limit is 35."

7. When she submitted her application for admission, the plaintiff was 39 years of age.

8. Plaintiff was one of more than 5,400 persons who applied for 104 available positions in the 1975-1976 entering class at the University of Chicago. An estimated 7,550 persons applied for approximately 170 available positions in the 1975-1976 entering class at Northwestern University, 60 of which were admitted from the Northwestern University Honors Program in Medical Education.

9. Plaintiff's applications for admission disclosed that at the time of her application she had received a grade point average of 3.17 in her undergraduate science courses, a cumulative grade point average of 3.46, and MCAT test scores as set forth in Finding 4 above. Plaintiff subsequently submitted information indicating that she achieved a final cumulative undergraduate grade point average of 3.53 and pointed out that the average of her MCAT test scores was 585.

10. Plaintiff's applications for admission to the 1975-1976 entering classes at the defendant medical schools were rejected although she met all of the formal requirements or prerequisites for admission such as undergraduate training and completion of the MCAT test.

11. Plaintiff's objective credentials in terms of her grade point average in undergraduate science courses and her MCAT test scores in the areas of science and quantitative ability were inferior to those presented by approximately 1,900 other persons who were denied admission to the 1975-1976 entering class at the University of Chicago. The Dean of Admissions testified that her application was rejected solely on the basis of such objective credentials.

12. Plaintiff presented no proof with respect to her relative standing among the large group of persons who applied for and were denied admission to the 1975-1976 entering class at Northwestern University nor the reasons why her application was rejected.

13. In addition to the defendant medical schools, plaintiff applied for and was denied admission to the 1975-1976 entering classes at the Chicago Medical School, Loyola University of Chicago Strich School of Medicine, Southern Illinois University School of Medicine, the Medical School at the Mayo Clinic, Rush Medical School, the Medical Schools of the University of Illinois, the University of Minnesota at Minneapolis and the University of Nebraska Medical School.

14. There is no evidence that defendants discriminated against the plaintiff on the basis of her sex, either purposefully or otherwise, in rejecting her applications for admission.

15. There is no evidence that any admission policy or practice of the defendant medical schools had a disparate impact upon women generally, upon women who applied to the defendant medical schools, or upon women who were interested in applying to the defendant medical schools but who did not in fact do so.

16. Certain observations made by one of plaintiff's witnesses, Professor Edwin C. Lewis, based largely upon his review of unidentified studies conducted by others and upon his experience as a counseling psychologist at Iowa State University in Ames, Iowa, with respect to the effect of "selection policies" upon women who are interested in attending graduate schools, are entitled to little if [any] weight. In any event, such observations have little probative value to the narrow issues raised by plaintiff's motion for a preliminary injunction.

17. Plaintiff has failed to show that she would have been admitted to the defendant medical schools but for the policies and practices which she challenges in this proceeding.

18. There is nothing in the record to show that any injury plaintiff might suffer outweighs the disruption which would be caused to the defendants and to their educational programs if the court were to grant plaintiff's request for preliminary injunctive relief.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the parties and of the subject matter. *Cannon* v. *University of Chicago*, ... U.S. ....., 60 L.Ed.2d 560 (1979).

2. Plaintiff seeks the entry of a mandatory preliminary injunction compelling the defendant medical schools to admit her to their 1979-1980 entering class.

3. A preliminary injunction is one that issued to protect a plaintiff from irreparable injury and, more importantly, to preserve the court's power to render a meaningful decision after a trial on the merits. *Meis* v. *Sanitas Service, Inc.*, 511 F.2d 655 (5th Cir. 1975).

4. The purpose of a preliminary injunction is to preserve the status quo. *South East Chicago Commission* v. *Department of Housing and Urban Development*, 488 F.2d 1119 (7th Cir. 1973); *Westinghouse Electric Corporation* v. *Free Sewing Machine Company*, 256 F.2d 806 (7th Cir. 1958).

5. *Rule 65* of the *Federal Rules of Civil Procedure* empowers a court to issue a preliminary injunction but establishes no prescribed procedure for its issuance. Thus, the grant or denial of the preliminary injunction is a matter solely within the sound discretion of the district court judge. *Beneficial Finance Corporation of Wisconsin* v. *Wirtz*, 346 F.2d 340 (7th Cir. 1965); *Bath Industries* v. *Blot*, 427 F.2d 97 (7th Cir. 1970).

6. Although the granting of such a motion is discretionary, courts have established four essential elements that the plaintiff must show in order to qualify for the relief sought: that the plaintiff is likely to succeed on the merits, that the plaintiff will suffer irreparable injury unless the injunctive relief is granted, that the injury to the plaintiff outweighs any injury which the defendant would suffer if the injunction were to be entered, and that the public interest warrants the issuance of the preliminary injunction. *Electri-Flex* v. *National Labor Relations Board*, 412 F. Supp. 698 (N.D.Ill. 1976). *See also*, *Washington* v. *Walker*, 529 F.2d 1062 (7th Cir. 1976); *Banks* v. *Trainor*, 525 F.2d 837 (7th Cir. 1975).

7. Of these factors, the threat of irreparable harm is, in most cases, considered to be the most important factor to be considered by the court. A failure to show irreparable harm will result in the denial of the injunctive relief. *Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973); *American Medical Association* v. *Weinberger*, 522 F.2d 921 (7th Cir.

1975). Under *Rule 65*, this requires more than a mere showing that the plaintiff will see his relative position deteriorate. *Sanders* v. *Airline Pilot's Association International*, 473 F.2d 244 (2nd Cir, 1972).

8. In a case such as this one, where both plaintiff and defendants could suffer harm, it becomes even more important for the court to be convinced beyond doubt that the plaintiff is entitled to the extraordinary relief of a preliminary injunction. The law and the facts must be clearly in the favor of the moving party. *Valentine* v. *Indianapolis-Marion County Building Authority*, 355 F.Supp. 1240 (N.D.Ind. 1973).

9. The burden of persuasion in a preliminary injunction case is always upon the plaintiff and may not be shifted to the defendant in any way. *Canal Authority of Florida* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974).

10. The court is being asked to exercise a very far-reaching power, a power that should never be indulged in except in the clearest of cases. *See, Lee* v. *Resor*, 348 F.Supp. 389 (N.D.Fla. 1972).

11. The sole basis for plaintiff's complaints and motion for a preliminary injunction is *Title IX* of the *Education Amendments of 1972, 20 U.S.C. § 1681 et. seq.*, which provedes in part that no person shall, on the basis of sex, be excluded from participation in, denied the benefit of, or be subjected to discrimination under certain described educational programs and activities, including the programs and activities conducted by each defendant medical school.

12. The parties are in disagreement as to what plaintiff must prove in order to succeed on the merits of her *Title IX* claim. Plaintiff urges that her *prima facie* claim for relief can be established by showing that the admission policies

and practices of the defendant medical schools have a disparate impact upon women and have not been shown validly to predict success in the education program or activity in question. Defendants urge that plaintiff has the burden of showing that defendants purposefully discriminated against her on the basis of sex. It is unnecessary for the court to resolve that matter at this time as neither showing has been made.

13. The court cannot deny the probative value of evidence that a policy alleged to exist in the admission procedures of both defendant medical schools had a disparate impact upon women in light of numerous recent Supreme Court discisions. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts* v. *Feeney*, 99 S.Ct 2282 (1979). However, the competent evidence admitted on the issue was insufficient to warrant the issuance of a preliminary injunction.

14. Moreover, in view of the large number of competing applicants who were also denied admission to the defendant medical schools, plaintiff failed to show that she would have been admitted but for the admission policies and practices which she challenges in this proceeding or that she suffered injury as the result of such policy or practice. *See, Henson* v. *University of Arkansas*, 519 F.2d 576 (8th Cir. 1975).

15. *The Age Discrimination Act of 1975, 42 U.S.C. § 6101, et. seq.*, to which plaintiff's counsel referred frequently during the course of the hearing on the motion for a preliminary injunction, is not properly before the court, nor was the aforesaid statute in effect at the time of the events alleged in plaintiff's complaint.

16. Under all the circumstances, plaintiff has failed to show that she is likely to succeed on the merits. *See, Cannon* v. *University of Chicago,* ..... U.S. ....., 60 L.Ed.2d 560 (1979), (statement of Powell, J., *dissenting,* at page 607, n. 19 that "plaintiff's chances of success on the merits in this case are infinitesimal").

17. Since plaintiff has failed to show that she is likely to succeed on the merits, or that any injury which she might suffer would outweigh the injury to defendants if the injunction were issued, the court cannot grant her motion. *Electri-Flex* v. *National Labor Relations Board,* 412 F.Supp. 698 (N.D.Ill. 1976); *Washington* v. *Walker,* 529 F.2d 1062 (7th Cir. 1976) and *Banks* v. *Trainor,* 525 F.2d 837 (7th Cir. 1975).

It is therefore ordered that the plaintiff's motion for the issuance of a preliminary injunction be, and the same is hereby, denied.

It is further ordered that the plainitff's objections to the defendants' proposed findings of fact and conclusions of law, which were filed on October 11, 1979, are sustained insofar as the plaintiff's amended findings of fact and conclusions of law have been incorporated herein. In all other respects, the plaintiff's objections are overuled.

Entered this 22nd day of October, 1979.

s / Julius J. Hoffman

SENIOR UNITED STATES
DISTRICT COURT JUDGE

EXHIBIT B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

ARGUED APRIL 8, 1980

April 25, 1980

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

GERALDINE G. CANNON,

Plaintiff-Appellant,

No. 79-2207

vs.

THE UNIVERSITY OF CHICAGO, et al., and
NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-C-2402, 75-C-2724
Julius J. Hoffman, *Judge.*

ORDER

Plaintiff-appellant Geraldine G. Cannon appeals from the denial of a preliminary injunction mandating her admission to the 1979 entering class of the medical schools of defendants,

The University of Chicago and Northwestern University. Plaintiff's complaint alleged that she was excluded from participation in the defendants' medical education programs on the basis of sex in violation of Title IX of the Education Amendment of 1972. Upon remand after the Supreme Court's decision in *Cannon* v. *The University of Chicago*, ... U.S. ..... (1979), the district court conducted an evidentiary hearing on the motion for a preliminary injunction. At the close of plaintiff's case, the motion was denied.

In *Kolz* v. *Board of Education*, 576 F.2d 747 (7th Cir. 1978), this court reiterated several axiomatic requirements for the granting of a preliminary injunction. The plaintiff "must establish a reasonable probability of success on the merits, irreparable injury, the lack of serious adverse effect on others, and sufficient public interest." *Id.* at 748-49 (citation omitted). The district judge weighed these factors and concluded that Ms. Cannon failed to make the necessary showings to warrant the grant of a preliminary injunction. In reviewing that decision, we cannot say that the findings were clearly erroneous nor that an abuse of discretion has otherwise been shown.

Our holding, of course, intimates nothing concerning the merits of Cannon's case, which we presume will be developed more fully in the hearing on a permanent injunction in the district court.

Accordingly, the judgment appealed from is affirmed.